IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FELIPE ROCHA, Petitioner, vs. ROBERT A. HOREL, Warden, Respondent.	No. C 07-3295 CRB (PR) ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner was convicted by a jury in the Superior Court of the State of California in and for the County of Del Norte of assault by a prisoner with a deadly weapon, Cal. Penal Code § 4501, and possession of a weapon while confined in state prison, Cal. Penal Code § 4502(a). The court also found that petitioner had suffered a prior conviction. On November 4, 2004, the court sentenced petitioner to eight years in state prison, the term to be served consecutive to the term he was already serving.

Petitioner appealed and, on May 18, 2006, the California Court of Appeal affirmed the conviction. On August 2, 2006, the Supreme Court of California denied review.

Petitioner then filed the instant federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. Per order filed on November 15, 2007, the court found

that the petition, liberally construed, stated cognizable claims under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent filed an answer to the order to show cause and petitioner filed a traverse.

BACKGROUND

The California Court of Appeal summarized the facts of the case as follows:

> [Petitioner] was an inmate at Pelican Bay State Prison on May 1, 2003. When he and his cellmate, whose last name was Moya, were out in a yard, they attacked two other inmates. Moya fought with an inmate named Francisco Cuevas, and [petitioner] fought with Angel Martinez in a grassy area. One correctional officer, Stephen Hurt, saw [petitioner] on top of Martinez, stabbing Martinez in the torso with a weapon. FN3 He yelled, "weapon." Officers sprayed the inmates with pepper spray to separate them, and [petitioner] threw the weapon aside. On the ground between where the two pairs had been fighting, an officer saw a weapon known as a "shank," which was similar to an ice pick. Officers also found a second weapon within 10 or 12 feet of Moya, and a weapon sheath fitting the second weapon in Moya's pocket. There was blood on Martinez, and he was treated for puncture wounds and scratches of a kind that could have been caused by the weapons found on the ground.
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> FN3 Seven other correctional officers testified at the trial. None of them mentioned having seen [petitioner] using a weapon, and at least four testified that they did not see a weapon used while the four inmates were fighting.
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> Martinez testified on [petitioner's] behalf that he had hit [petitioner] first, that no one used any weapons, and that his injuries were caused by a concrete bench, a fingernail, and the ground. FN4 A private investigator testified that Cuevas had told him no weapons were used during the incident, that the fight was "No big deal," and that Martinez's injuries came from pimples and lesions popping open. FN5 He also testified that Martinez had told him he received his puncture wounds from the grass, dirt, and rocks, and that [petitioner] had not stabbed him. Two other inmates testified that they saw the fight but did not notice any weapons, and one testified that he had been checked with a metal detector before going out on the yard that day.
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> FN4 On rebuttal, an investigator testified that Martinez had told him he "swung first" because [petitioner] was "coming at [him]," and that Martinez did not provide a consistent story about the cause of his injuries.
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> FN5 The licensed vocational nurse who saw Martinez after

> the fight testified that his puncture wounds could not have been caused by lesions coming open or by falling on gravel or rocks on the lawn.

People v. Rocha, No. A108363, 2006 Cal. App. Unpub. LEXIS 4349, at **2-3 (Cal. Ct. App. May 18, 2006) (footnotes and footnote numbering in original).

DISCUSSION

I. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." Id. at 409.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Id. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent, only the Supreme Court's holdings are binding on the state courts and only those holdings need be "reasonably" applied. Id.

II. Claims

Petitioner raises two claims for federal habeas relief under § 2254: (1) ineffective assistance of counsel and (2) improper denial of request for substitute counsel.

1. Ineffective Assistance of Counsel

Petitioner claims that his attorney was constitutionally ineffective because he failed to file a Pitchess motion compelling discovery of Officer Hurt's personnel records in order to explore a "possible history of falsified information, planting evidence, [and] racial biases." Pet. at A-7. Under California law, a criminal defendant may compel discovery of police officers' personnel files by filing a Pitchess motion supported by affidavits showing good cause, materiality, and a reasonable belief that the agency has the information at issue. See Cal. Evid.

Code. 1043(b)(3); Pitchess v. Superior Court, 11 Cal.3d 531 (1974).

To prevail on a claim of ineffective assistance of counsel, petitioner must pass the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must demonstrate that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "counsel's deficient performance prejudiced the defense." Id. at 687-88. Concerning the first element, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Hence, "judicial scrutiny of counsel's performance must be highly deferential." Id. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). To fulfill the second element, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id.

The California Court of Appeal rejected petitioner's claim on the ground that counsel had a rational tactical reason for not filing the motion - counsel chose to pursue the defense strategy that Hurt's testimony was mistaken, rather than cast him as a liar. Rocha, 2006 Cal. App. Unpub. LEXIS 4349, at *6. The court also found that the record contained no evidence that petitioner would have had good cause to bring such a motion and that petitioner's "unsupported speculation" that Hurt's personnel file might contain evidence that he fabricated charges against other inmates was insufficient to show ineffective assistance of counsel. Id. at **6-7.

The California Court of Appeal's rejection of petitioner's claim was not

contrary to, or involved an unreasonable application of, the Strickland standard, or was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). The record shows that counsel gave a reasonable explanation for his tactical decision to cast Hurt's testimony as mistaken rather than dishonest. In petitioner's September 20, 2004 Marsden hearing, petitioner told the court that his attorney failed to file a Pitchess motion. Resp't ex. B, vol. 13 at 78. Counsel explained that he didn't believe the potential evidence was important because he could show that Hurt's account was mistaken. Id. at 90. He explained that the surveillance tape would show petitioner on the bottom of the scuffle, not on top like Hurt had testified; other witnesses "watching him intently" would testify that they did not see any weapon; and Martinez would testify that he was the aggressor and that he was not stabbed by petitioner. Id. at 91. The court agreed:

> I think it's much smarter tactically to say the officer made a mistake and here's the proof and here's other testimony for the other officers and the other people . . . [counsel's] bottom line is even if it was successful he doesn't need it because he's got the other testimony . . . [t]hat seems to make sense to me the reason or the technical reason for doing it.

Id. at 100-01. Counsel was not ineffective for his strategic decision to cast Hurt's account as a mistake and not file a Pitchess motion. See Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (reasonable tactical decisions of trial counsel deserve deference); United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981) (a difference of opinion as to trial tactics does not constitute denial of effective assistance).

Petitioner claims that the failure to file the motion prejudiced the trial outcome because Hurt's testimony was the only eyewitness evidence tying petitioner to the crime. But he sets forth no evidence whatsoever showing a reasonable probability that, but for counsel's failure to file a Pitchess motion, the result of the proceeding would have been different. See Strickland, 466 U.S. at

694. There is simply no evidence, or even indication, that a Pitchess motion would have revealed any evidence of misconduct on the part of Hurt.

Petitioner is not entitled to federal habeas relief on this claim.

2. Substitution of Counsel

Petitioner claims that the trial court improperly denied his four requests for substitution of counsel because his relationship with his attorney was "embroiled in such an irreconcilable conflict that ineffective representation was likely to result." Pet. at B-23.

The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas. Bland v. California Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (en banc). The inquiry for a federal habeas court is whether the trial court's denial of or failure to rule on the motion "actually violated [petitioner's] constitutional rights in that the conflict between [petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell, 218 F.3d at 1026.

The California Court of Appeal summarized the hearings petitioner received on his four requests for substitution of counsel under People v. Marsden, 2 Cal. 3d 118 (1970):[1]

> At a hearing on the first Marsden motion on July 22, 2004, [petitioner] complained that his counsel had not properly advised him of his right not to waive time; had not accepted his suggestions

[1]This California rule substantially parallels the federal rule. See Chavez v. Pulley, 623 F. Supp. 672, 687 n.8 (E.D. Cal. 1985).

on handling the defense; and was not following up on possible witnesses, including an inmate witness who could testify that he did not see [petitioner] use or throw a weapon during the fight. He also wanted his counsel to file a motion based on the lack of evidence that he had committed a crime. His counsel, Patrick Foley, told the court he did not think the witnesses [petitioner] wanted were relevant to the issues of the case; that he intended to call all helpful witnesses; and that he had gone to the prison seven or eight times to visit [petitioner]. He also said that based on something that had happened when he met with [petitioner], he would have an ethical problem with putting [petitioner] on the stand. The trial court denied the Marsden motion, indicating [counsel] was making efforts on [petitioner's] behalf and that they should be able to work together.

A hearing on [petitioner's] second Marsden motion took place on August 26, 2004. [Petitioner] complained that [counsel] had not moved to show there was insufficient evidence to proceed with the case; that [counsel] had told him the preliminary hearing was a formality; that [counsel] had not moved to dismiss due to discriminatory prosecution; and that [counsel] had not subpoenaed a witness he believed would be helpful. He also complained of [counsel's] unwillingness to put him on the witness stand, stating that he could no longer confide in [counsel]. Furthermore, according to [petitioner], [counsel] had been trying to intimidate him into accepting a plea bargain. [Counsel] responded that the motions [petitioner] wanted him to file would not be useful and would waste the court's time, and that the testimony of the witness [petitioner] wanted him to call could easily be impeached on cross-examination. He indicated he had visited [petitioner] as much as he had seen most of his other clients, that they had discussed all the options, and that although he had told [petitioner] it was "kind of foolish" to turn down a plea offer, he did not tell him he had to take the deal. He thought [petitioner] had a triable case and was happy to proceed with it. The trial court denied the motion, noting that [counsel] was an experienced defense attorney who worked diligently for his clients.

At the September 16, 2004, hearing on the third Marsden motion, [petitioner] complained that [counsel] was not coming to see him; that [counsel] would not meet with him unless a defense investigator was present; that [counsel] had not given him documents he had requested, including witness statements; that [counsel] had not subpoenaed the doctor who treated Martinez at the hospital; and that [counsel] had not filed various motions [petitioner] wanted, including a Pitchess motion and a motion to dismiss the case on the ground that the statements Hurt had made in the preliminary hearing were inconsistent with the videotape of the incident. [Petitioner] also complained that [counsel] was sympathetic to the prosecution; that he refused to call Hurt a liar; that he was unwilling to put [petitioner] on the witness stand at trial; and that he had shown the prosecution an enhanced videotape of the incident before showing it to [petitioner]. [Counsel] told the court that he saw no basis for the

> motions [petitioner] wanted him to file and that he thought he had given [petitioner] all of the witness statements. He also said he was unwilling to interview [petitioner] without the defense investigator present, saying "[petitioner] mixes up everything I say." The trial court denied the Marsden motion, stating that [counsel] was competent and able to proceed.
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> [Petitioner] moved for substituted counsel for a fourth time on September 30, 2004. He indicated that he did not trust either [counsel] or the defense investigator, and complained again of [counsel's] refusal to file motions and subpoena witnesses he had requested, of the fact that [counsel] had shown the enhanced videotape to the prosecution, of [counsel's] refusal to visit [petitioner], and of his refusal to put [petitioner] on the witness stand. In particular, he explained that he wanted [counsel] to file a Pitchess motion. He argued that Hurt's testimony contradicted the videotape and the testimony of other witnesses, and suggested that Hurt might have a tendency to lie. He also read from a letter [counsel] had sent to him indicating [petitioner] had received copies of all transcripts and that [counsel] would not meet with him again before trial because it would not be productive.
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> [Counsel] told the court he did not think meeting with [petitioner] would be productive because "we've gone over this thing about the motions too many times and he's not really listening to me." The trial court agreed with him that no available motion would cause the case to be dismissed. [Counsel] said he had visited [petitioner] in prison approximately 10 times and was ready to go to trial. He explained that the testimony of Moya, whom [petitioner] wanted him to subpoena, would conflict with Martinez's testimony that he had not been stabbed; that he was concerned that if he subpoenaed the doctor who treated Martinez, he might "make [the prosecution's] case for them"; and that the in limine motions [petitioner] wanted would be meritless. As to the videotape, [counsel] explained that he had shown it to representatives of the district attorney in an attempt to persuade them to dismiss the case. [Counsel] also told the court that if [petitioner] took the stand, ethical concerns would prevent [counsel] from asking him any questions. He told the court he thought he could continue with the case and that there was a good chance of an acquittal. The trial court denied the motion, telling [petitioner] that he could testify in the form of a narrative and concluding that the breakdown in communications was not so irreconcilable [counsel] could not provide effective assistance.

Rocha, 2006 Cal. App. Unpub. LEXIS 4349, at **8-13 (footnote omitted).

The California Court of Appeal rejected petitioner's claim on the ground that there was no irreconcilable conflict between petitioner and his attorney. Id. at *16. The court explained:

> Our review of the transcript of the four [Marsden] motions indicates that the trial court allowed [petitioner] to express his concerns and inquired into them. Where [petitioner] and his counsel disagreed on trial strategy, [counsel] explained his strategy. The trial court could reasonably accept both those explanations and [counsel's] statements that he had visited [petitioner] numerous times in prison and further visits would not be productive. Nor do [counsel's] ethical concerns about questioning [petitioner] on the witness stand indicate an irreconcilable breakdown of the attorney-client relationship. [Petitioner] was given the option of testifying in the form of a narrative, and the trial court did not abuse its discretion in accepting [counsel's] assurances that he could provide an effective defense.

Id. at **15-16.

The California Court of Appeal's rejection of petitioner's claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). Counsel told the court that he visited petitioner ten times in prison. Resp't ex. B, vol. 13 at 94. He reported seeing petitioner "as much as I've seen most of my other clients." Resp't ex. B, vol. 12 at 53. Counsel stated that he could "effectively represent" petitioner because it was a viable case he expected to win. Resp't ex. B, vol. 13 at 99. And both counsel and petitioner represented to the court that they would be ready to go to trial if the court denied the substitution motion. Id. at 98-99. The record does not show a conflict resulting in a total lack of communication or significant impairment in the relationship between petitioner and counsel such that petitioner was effectively deprived of counsel. See Schell, 218 F.3d at 1026; compare Stenson v. Lambert, 504 F.3d 873, 886-887 (9th Cir. 2007) (no irreconcilable conflict where defense counsel refused to pursue defendant's suggested trial strategy that counsel did not believe would succeed and defendant and second-chair attorney were still communicating with each other), with Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970) (sufficient evidence of irreconcilable conflict found where defendant was forced to trial with assistance of

lawyer with whom he would not, in any manner whatsoever, communicate).

Petitioner alleges that there was a conflict because counsel refused to see him on several occasions. But counsel explained that meetings were no longer productive because they kept discussing the same meritless motions. Resp't ex. B, vol. 13 at 94. Counsel was willing to meet with petitioner with his investigator present because petitioner "makes mistakes as to what I say about everything," Resp't ex. B, vol. 15 at 34, but petitioner did not want the investigator present. Id. at 35. There is no evidence in the record indicating that counsel refused to meet with petitioner, only that he required the investigator to be present to account for what was said during the meeting.

Counsel made necessary efforts to represent petitioner - he met with petitioner, was willing to continue meeting with petitioner with the investigator present, was prepared to advocate for petitioner at trial, and expected to win. The court agreed:

> [I]t sounds to me that [counsel] is prepared and that he knows what he's doing. You may not agree with it. But it sounds like he's . . . prepared to go forward . . . the breakdown is not so irreconcilable that there's an actual conflict in representation such that you have ineffective assistance of counsel. Now, I think what you ought to do is that two of you talk again and try to come together for this trial and be prepared to go forward.

Resp't ex. B, vol. 13 at 104-105. Counsel's representation of petitioner at trial did not constitute a deprivation of counsel in violation of the Sixth Amendment. See Schell, 218 F.3d at 1026.

Petitioner's claim that he did not trust his attorney does not compel a different conclusion. The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. Morris v. Slappy, 461 U.S. 1, 14 (1983); see Plumlee v. Masto, 512 F.3d 1204, 1211 (9th Cir.) (finding no 6th Amendment violation when defendant is represented

by lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust), cert. denied, 76 U.S.L.W. 3636 (2008). Although petitioner and counsel disagreed at times, petitioner's lack of trust, without evidence of an actual conflict leading to a total breakdown in communication, is insufficient to warrant relief. See Plumlee, 512 F.3d at 1211; Schell, 218 F.3d at 1026.

Petitioner is not entitled to federal habeas relief on this claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

The clerk shall enter judgment in favor of respondent and close the file.

SO ORDERED.

DATED: July7, 2008

CHARLES R. BREYER
United States District Judge